

L2W
Const.
B293

HANDBOUND
AT THE



UNIVERSITY OF
TORONTO PRESS



Digitized by the Internet Archive
in 2007 with funding from
Microsoft Corporation



ms.
B295

6070

1

THE DRAFT BILL

TO CONSTITUTE THE

COMMONWEALTH OF AUSTRALIA,

AS ADOPTED BY THE CONVENTION OF 1891.

EDITED BY

G. B. BARTON,

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

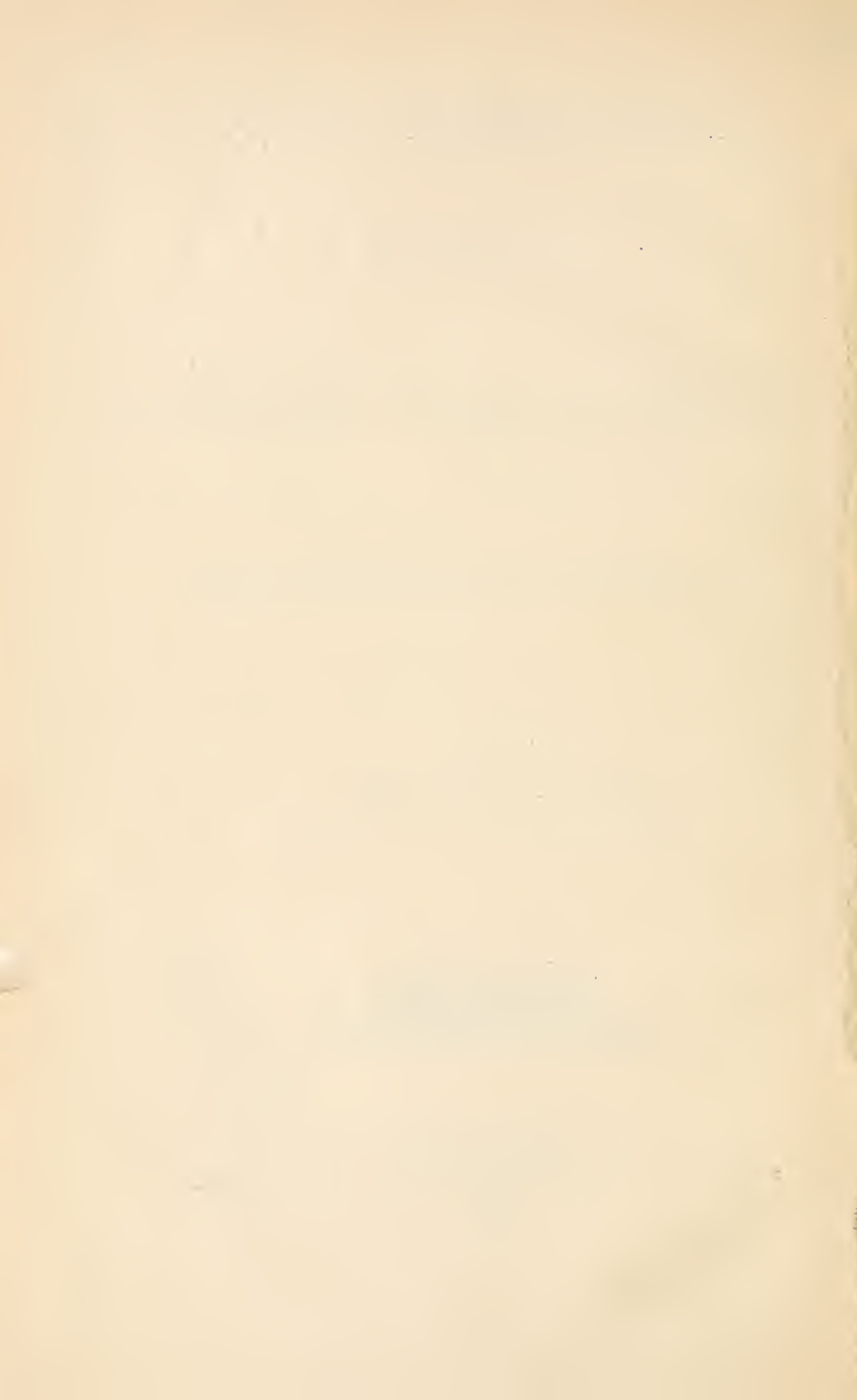


11.04.9
22.5.11

By Authority:

SYDNEY: GEORGE STEPHEN CHAPMAN, ACTING GOVERNMENT PRINTER.

—
1891.



PREFACE.

THE object in view in the present publication is to present the draft Bill to constitute the Commonwealth of Australia in a convenient shape for reference, with such editorial notes as will enable readers, not accustomed to the study of Constitutions, to make themselves acquainted with its provisions without much difficulty. The bill itself has been drafted with an evident desire to make matters as clear as possible to the general reader ; but the language of the law is always more or less a foreign one to him ; and since the machinery of a Federal Constitution is necessarily complex in construction and intricate in details, the most ingenious draftsman is liable to be misunderstood in his simplest clause. But an editor is at liberty to substitute plain English for terms of art, and to explain their meaning, when necessary, by a little commentary of his own. This is all that has been attempted on the present occasion.

12 June.

THE CONVENTION.

At a sitting of the National Australasian Convention, held in Sydney on the 18th March, 1891, a committee was appointed for the consideration of the Constitutional Machinery and the distribution of Functions and Powers in the Federation; a second, for the consideration of provisions relating to Finance, Taxation, and Trade Regulations; and a third, to consider the question of the establishment of a Federal Judiciary, its Powers and Functions. The two latter committees were directed to report to the first on the respective subjects remitted to them; and on the result of their deliberations being so reported, it was authorised to prepare and submit to the Convention a bill for the establishment of a Federal Constitution. The delegates from each colony then proceeded to choose the members of the three committees; two from each colony being appointed to act on the first committee, and one on the second and third. The committees consisted of the following members:—

Committee on Constitutional Machinery and the distribution of Functions and Powers:

New South Wales	{	Sir Henry Parkes.
	{	Edmund Barton.
Victoria	{	Duncan Gillies.
	{	Alfred Deakin.
Queensland	{	Sir Samuel Walker Griffith.
	{	Andrew Joseph Thynne.
South Australia	{	Thomas Playford.
	{	Sir John William Downer.
Tasmania	{	Andrew Inglis Clark.
	{	Adye Douglas.
New Zealand	{	Sir George Grey.
	{	Capt. William Russell Russell.
Western Australia ...	{	John Forrest.
	{	Sir James George Lee-Steere.

Committee on Provisions relating to Finance, Taxation, and Trade Regulations:

New South Wales	William McMillan.
Victoria	James Munro.
Queensland	Sir Thomas Mellwraith.
South Australia	Sir John Cox Bray.
Tasmania	William Henry Burgess.
New Zealand	Sir Harry Albert Atkinson.
Western Australia	William Edward Marmion.

Committee on establishment of a Federal Judiciary, its Powers and its Functions :—

New South Wales	George Richard Dibbs.
Victoria	Henry John Wrixon.
Queensland	Arthur Rutledge.
South Australia	Charles Cameron Kingston.
Tasmania	Andrew Inglis Clark.
New Zealand	Sir Harry Albert Atkinson.
Western Australia	John Winthrop Hackett.

On the 31st March, Sir S. W. Griffith, Chairman of the Committee on Constitutional Machinery, submitted to the Convention a draft "Bill to Constitute the Commonwealth of Australia," together with the reports from the two other committees. The bill was referred to a Committee of the whole Convention on the following day; and its several clauses were accordingly discussed from day to day until the 8th April, when they were finally agreed to; the bill being adopted on the 9th. It was resolved, as a recommendation of the Convention, on the motion of Sir S. W. Griffith, that provision should be made by the Parliaments of the several colonies for submitting, for the approval of the people of the colonies respectively, the Constitution of the Commonwealth of Australia, as framed by the Convention. It was further recommended, on a motion by the same delegate, that so soon as the Constitution should be adopted by three of the colonies, Her Majesty's Government should be requested to take the necessary action to establish it, in respect of those colonies.

THE TERM "COMMONWEALTH."

The bill sets out with the usual introduction in the shape of a short preamble, reciting that certain of the Australasian colonies—the names of which will be inserted in the bill when it comes before the Imperial Parliament—have agreed to unite in one Federal Commonwealth under the Crown, and under the Constitution as defined in the bill. The mode by which the colonies so agreeing will express their desire to unite is not specified; a blank is left for the purpose, which, like the names of the colonies uniting, will be filled up when the bill is introduced into the Imperial Parliament.

The preamble is followed by eight enacting clauses, the first of which gives the title of the proposed Act as "The Constitution of the Commonwealth of Australia."

The word "Commonwealth" was much more familiar to the ears of Englishmen in the sixteenth and seventeenth centuries than it has been at any time since. Shakspeare's plays make it evident that it was in common use among all classes in his time, and that it had no such political meaning attached to it as it acquired in later years. That it meant nothing more than the State or community, without any reference to the form of its government, is manifest from the following passages:—

And in the administration of the law,
Whiles I was busy for the Commonwealth,
Your Highness pleased to forget my place,
The majesty and power of law and justice,
The image of the King whom I presented,
And struck me in my very seat of judgment.*

Since thou wert King, and who is King but thou?
The Commonwealth hath daily run to wreck.†

* Third Part of Henry IV., act v, sc. 2.

† Henry VI., act i, sc. 3.

Hear him debate of Commonwealth affairs,
You would say—it hath been all in all his study.*

And now, forsooth, takes on him to reform
Some certain edicts, and some strait decrees
That lie too heavy on the Commonwealth.†

Let us on,
And publish the occasion of our arms ;
The Commonwealth is sick of their own choice.‡

The political writers of the same period also used the word in the general sense of a State or established community, no matter what the form of government might be. Hobbes so used it in his *Leviathan*, published in 1651 :—

And because the sovereignty is either in one man, or in an assembly of more than one, it is manifest there can be but three kinds of Commonwealth. When the representative of the people is one man, then is the Commonwealth a monarchy ; when an assembly of all that will come together, then it is a democracy, or popular Commonwealth ; when an assembly of a part only, then it is called an aristocracy.§

The title chosen by James Harrington for his treatise on government—"The Commonwealth of Oceana"—was not selected for the purpose of securing the favour of "the Lord Protector of the Commonwealth" to whom it was dedicated, but because it was the proper scientific term for his subject, according to the usage of the time. So much was this the case that the Kings and Queens of the period used the word in the same sense in their addresses to the Lords and Commons ; James the First was even pleased to call himself "the Great Servant of the Commonwealth." Locke's use of the word in his treatise "Of Civil Government," shews the distinction formerly observed between the two things :—

By the same act, therefore, whereby any one unites his person, which was before free, to any Commonwealth, by the same he unites his

* Henry V., act i, sc. 1.

† Second Part of Henry IV., act iv, sc. 3.

‡ Ibid, act i, sc. 3.

§ English Works (ed. Molesworth) vol. III, p. 171.

possessions, which were before free, to it also ; and they become, both of them, person and possessions, subject to the government and dominion of that Commonwealth, as long as it hath a being.

The establishment of Oliver Cromwell's government, with the title of a Commonwealth, which was no doubt chosen by the Republicans in order to propitiate the Commons of England, led to a great change in the ordinary meaning of the word. It may be seen in Milton's treatise, "The Ready and Easy Way to establish a Free Commonwealth," published in 1659-60, in which the word is used throughout as an equivalent to the term Republic :—

A free Commonwealth, without single person or house of lords, is by far the best government, if it can be had.

Now is the opportunity, now the very season, wherein we may obtain a free Commonwealth, and establish it for ever in the land, without difficulty or much delay.

From the time of the Restoration to the present the word may be said to have gradually disappeared from the conventional language of political writers, as much as it has done from ordinary conversation. But there is a decided tendency at the present time to revive it. A commentary on the principles of British Government was published some years ago by Homer-sham Cox, under the title of "The British Commonwealth ;" and the recently published work of James Bryce, in which the political institutions of the United States are criticised with so much power, is entitled "The American Commonwealth."

Draft of a Bill as adopted by the National Australasian Convention,
9th April, 1891.

HENRY PARKES, *President.*

F. W. WEBB, *Secretary.*

DRAFT OF A BILL

To Constitute the Commonwealth of Australia.

Preamble.

WHEREAS the Australasian Colonies of [*here name the Colonies which have adopted the Constitution*] have by [*here describe the mode by which the assent of the Colonies has been expressed*] agreed to unite in one Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established: And whereas it is expedient to make provision for the admission into the Commonwealth of other Australasian Colonies and Possessions of Her Majesty: Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in the present Parliament assembled, and by the authority of the same, as follows:—

Short title.

1. This Act may be cited as “The Constitution of the Commonwealth of Australia.”

Application of provisions referring to the Queen.

2. The provisions of this Act referring to Her Majesty the Queen extend also to the Heirs and Successors of Her Majesty in the Sovereignty of the United Kingdom of Great Britain and Ireland.

Constitution of the Commonwealth of Australia.

Power to proclaim Commonwealth of Australia.

3. It shall be lawful for the Queen, by and with the advice of Her Majesty's Most Honorable Privy Council, to declare by Proclamation that, on and after a day therein appointed, not being later than six

months after the passing of this Act, the Colonies of [*here name the Colonies which have adopted the Constitution*] (which said Colonies and Province are hereinafter severally included in the expression "the said Colonies") shall be united in one Federal Commonwealth under the Constitution hereby established, and under the name of "The Commonwealth of Australia"; and on and after that day the said Colonies shall be united in one Federal Commonwealth under that name.

Commencement of Act.

4. Unless where it is otherwise expressed or implied this Act shall commence and have effect on and from the day so appointed in the Queen's Proclamation; and the name "The Commonwealth of Australia" or "The Commonwealth" shall be taken to mean the Commonwealth of Australia as constituted under this Act.

"States."

5. The term "The States" shall be taken to mean such of the existing Colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, and Western Australia, and the Province of South Australia, as for the time being form part of the Commonwealth, and such other States as may hereafter be admitted into the Commonwealth under the Constitution thereof, and each of such Colonies so forming part of the Commonwealth shall be hereafter designated a "State."

Repeal of 48 and 49 Vict., chap. 60.

6. "The Federal Council of Australasia Act, 1885," is hereby repealed, but such repeal shall not affect any laws passed by the Federal Council of Australasia and in force at the date of the establishment of the Constitution of the Commonwealth.

But any such law may be repealed as to any State by the Parliament of the Commonwealth, and may be repealed as to any Colony, not being a State, by the Parliament thereof.

Operation of the Constitution and laws of the Commonwealth.

7. The Constitution established by this Act, and all laws made by the Parliament of the Commonwealth in pursuance of the powers conferred by the Constitution, and all Treaties made by the Commonwealth, shall, according to their tenor, be binding on the Courts, Judges, and people, of every State, and of every part of the Commonwealth, anything in the laws of any State to the contrary notwithstanding: and the Laws and Treaties of the Commonwealth shall be in force on board of all British ships whose last port of clearance or whose port of destination is in the Commonwealth.

Constitution.

8. The Constitution of the Commonwealth shall be as follows :

THE CONSTITUTION.

Division of Constitution.

This Constitution is divided into Chapters and parts as follows :—

CHAPTER I.—THE PARLIAMENT :

PART I.—GENERAL ;

PART II.—THE SENATE ;

PART III.—THE HOUSE OF REPRESENTATIVES ;

PART IV.—PROVISIONS RELATING TO BOTH HOUSES ;

PART V.—POWERS OF THE PARLIAMENT :

CHAPTER II.—THE EXECUTIVE GOVERNMENT :**CHAPTER III.—THE FEDERAL JUDICATURE :****CHAPTER IV.—FINANCE AND TRADE :****CHAPTER V.—THE STATES :****CHAPTER VI.—NEW STATES :****CHAPTER VII.—MISCELLANEOUS :****CHAPTER VIII.—AMENDMENT OF THE CONSTITUTION.****CHAPTER I.****THE PARLIAMENT.****PART I.—GENERAL.**

Legislative powers.

1. The Legislative powers of the Commonwealth shall be vested in a Federal Parliament, which shall consist of Her Majesty, a Senate, and a House of Representatives, and which is hereinafter called “The Parliament.”

Governor-General.

2. The Queen may, from time to time, appoint a Governor-General, who shall be Her Majesty’s Representative in the Commonwealth, and who shall have and may exercise in the Commonwealth during the Queen’s pleasure, and subject to the provisions of this Constitution, such powers and functions as the Queen may think fit to assign to him.

[Exception has been taken to this clause, and others referring to the Governor-General, on the ground that they propose to confer “enormous” powers on her Majesty’s representative—

such powers indeed as have never been granted to any Governor in these colonies. This contention overlooks the fact that, under parliamentary government, the power nominally placed in the Governor's hands is really granted to the people; because it can only be exercised by him through his Executive, who are virtually appointed by the electors. It follows that, by increasing the range of power to be vested in the Governor-General, the measure of constitutional freedom to be enjoyed by the people would be proportionately enlarged.

The truth of this proposition may be proved by the experience of Canada under the Act which established the Dominion in 1867.* It does not contain any similar clause to the one above. It enacts that the executive Government and authority of and over Canada shall continue and be vested in the Queen; and that all the powers, authorities, and functions which, under any Act of Parliament, were previously vested in and exercised by the Governors of the various Provinces forming the Dominion, either individually or with the advice of their respective Executive Councils, should be vested in and exercised by the Governor-General, either individually or with the advice of the Privy Council, as the case might be—so far as they were capable of being exercised after the Union, and subject, with certain exemptions, to abolition or alteration by the Canadian Parliament.

The result of these provisions was that, when the first Governor-General of Canada was appointed, the great difference between such an officer and a Governor under the old system was not recognised in the instructions given to him. No change was made in the stereotyped list of powers, authorities, and functions contained in the official documents issued on his appointment; and consequently he stood in much the same position, so far as they were concerned, as the Governor of a province under the old *regime*. It was not until 1876 that this matter was brought specially under the notice of the Imperial Government by a despatch from the Earl of Dufferin, then Governor-General, which was written at the instance of his Ministers in reply to a

* The British North America Act, 1867.

circular despatch from the Colonial Office received in the previous year. The Secretary of State for the Colonies, having in view the revision of the existing system with respect to the commissions and instructions issued to the Governors of colonies on their appointment, had thought proper to invite the attention of the various Governors then in office, and their responsible advisers, to the matter, with a view to their submitting such alterations and amendments as might appear advisable in the case of the particular colonies they represented. Lord Dufferin, having consulted with his Ministers, enclosed in his despatch a memo. on the subject drawn up by a sub-committee of the Canadian Privy Council, in which the usual instructions given to Governors were declared to be not only inapplicable in the case of the Dominion, but in many respects objectionable. Canada under the Union, they said, was something more than a colony ; it was a group of seven colonies federally united under an Act of the Imperial Parliament ; and it was therefore clearly entitled to the amplest measure of self-government in the administration of its affairs. The powers which the Dominion Government claimed to exercise should, therefore, be formally recognised and embodied in the instructions issued to the Governor-General, and it ought to be established as a fundamental principle that he must act in all cases on the advice of his Ministers.

This assertion of right on the part of the Canadian Ministers gave rise to a correspondence between the Governor-General and the Earl of Carnarvon, then Secretary of State for the Colonies, which extended over nearly two years, and ended in the formal concession of almost every point contended for. Among the amendments which they suggested, was the omission of several clauses which were still inserted in the instructions, although they were either obsolete or superfluous on the one hand, or, on the other, such as should be left to be determined by the application of constitutional principles. The particular instructions referred to were, those which concerned the transaction of business by the Executive Council : which authorised the Governor, in certain contingencies, to act in opposition to their

advice; which prescribed the class of bills he should reserve for the consideration of the Imperial Government; and others relating to matters which, under the Union, were necessarily dealt with by the provincial governments as subjects of local administration or legislation.

It was in accordance with the understanding arrived at on this occasion that a new code of instructions was drawn up, with the commission given to the Marquis of Lorne, on his appointment as Governor-General in 1878. The powers and functions conferred on him were set forth in the Letters Patent constituting the office, the instructions accompanying them, and the commission. The essential difference between the old system and the new is thus stated by Todd:—"In their substantial omissions, as well as in their positive directions, these instruments clearly indicate the larger measure of self-government thenceforth conceded to the Dominion. This increase of power, to be exercised by the Government and Parliament of Canada, was not merely relatively greater than that now enjoyed by other colonies of the Empire, but absolutely more than had been previously entrusted to Canada itself, during the administration of any former Governor-General."

It is evident, therefore, that so far from the increase of power conferred on the Governor-General of Canada under the Federal Constitution involving any restriction of the rights, liberties, and privileges previously enjoyed by the people, they actually obtained larger powers of self-government than they had possessed at any time before; and that not relatively, but absolutely. It is sufficient to mention, as an illustration of the change thus brought about, that the practice of reserving bills for the Queen's assent has been virtually discontinued in Canada; and that the exercise of the veto is confined to cases in which the local Act is either in conflict with Imperial interests, or repugnant to Imperial laws extending to the colony.

It is further asserted that this clause is objectionable because (1) by the terms of the draft Bill, the Letters Patent and the instructions containing the powers and functions which the

Queen is authorised to confer on the Governor-General, will become part of our statute law as soon as the Constitution is proclaimed; (2) because, in this colony, Letters Patent and instructions are nowhere made part of the statute law; (3) because by such means "a thousand openings for interference in our affairs" might be made by the Imperial Government; and (4) because the words, "powers and functions," are evidently intended to mean something more than provisions to regulate the Governor-General's action in allowing, disallowing, or reserving bills, those being matters provided for in subsequent clauses of the draft Bill (57, 58, 59), which substantially agree with the provisions of the Imperial Act 5 and 6 Vict., c. 76 (ss. 31, 32, and 33) preserved in force by the Imperial Act authorising her Majesty to assent to our Constitution Act (18 and 19 Vict., c. 54, s. 3).

So far as these objections relate to a possible extension of powers and functions, they are sufficiently answered in the preceding paragraphs. But it may be added that, even in the event of such an extension taking place, the draft Bill provides that the additional powers and functions to be conferred could only operate "subject to the provisions of this Constitution." They could not, therefore, be opposed to its spirit, still less to its letter. Although there is no similar clause in the Canadian or the South African Act, it is desirable that the draft Bill should provide for the appointment of a Governor-General; and in view of the facts already mentioned with respect to the Governor-General of Canada, it is also desirable that the powers and functions with which he is to be invested should form the subject of mature consideration both here and in England. The provision in the draft Bill would enable the Colonial Office to carry out the views of the Australian Parliaments on the subject, which will probably engage their attention before it is sent to England. It is not possible to see how such a power can be properly described as "dangerous," when we recollect that the Earl of Carnarvon in 1878 showed so much readiness to acquiesce in the views of the Canadian Ministers; and it is absolutely certain that they never complained of "a thousand openings"

having been made for "interference in their affairs," when the revised instructions were issued to the Governor-General in that year.

It is not correct to say that "royal instructions are nowhere made part of our statute law." They are virtually incorporated with it in the Act authorising her Majesty to assent to our Constitution Act, which distinctly enacts that "the instructions to be conveyed to Governors for their guidance" in relation to the allowing, disallowing, and reserving of bills, shall apply to all bills passed by our Parliament. Apart from that, it is quite clear that all the Letters Patent, Instructions, and Commissions issued to the Governors of this colony since the days of Governor Phillip, form part and parcel of our constitutional law.]

Salary of Governor-General.

3. The Annual Salary of the Governor-General shall be fixed by the Parliament from time to time, but shall not be less than Ten thousand pounds, and shall be payable to the Queen out of the Consolidated Revenue Fund of the Commonwealth. The Salary of a Governor-General shall not be diminished during his continuance in office.

Application of provisions relating to Governor-General.

4. The provisions of this Constitution relating to the Governor-General extend and apply to the Governor-General for the time being or other the Chief Executive Officer or Administrator of the Government of the Commonwealth, by whatever title he is designated.

Oath of Allegiance.—Schedule.

5. Every Member of the Senate, and every Member of the House of Representatives, shall before taking his seat therein make and subscribe before the Governor-General, or some person authorised by him, an Oath or Affirmation of Allegiance in the form set forth in the Schedule to this Constitution.

Governor-General to fix times and places for holding Session of Parliament.—Power of dissolution of House of Representatives.—First Session of Parliament.

6. The Governor-General may appoint such times for holding the first and every other Session of the Parliament, as he may think fit, giving sufficient notice thereof, and may also from time to time, by proclamation or otherwise, prorogue the said Parliament, and may in like manner dissolve the House of Representatives.

The Parliament shall be called together not later than six months after the date of the establishment of the Commonwealth.

Yearly Session of Parliament.

7. There shall be a Session of the Parliament once at least in every year, so that twelve months shall not intervene between the last sitting of the Parliament in one Session, and its first sitting in the next Session.

Privileges, &c., of Houses.

8. The privileges, immunities, and powers, to be held, enjoyed, and exercised by the Senate and by the House of Representatives respectively, and by the Members thereof, shall be such as are from time to time declared by the Parliament, and until declared shall be those held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom, and by the Members thereof, at the date of the establishment of the Commonwealth.

[The corresponding clause in the Canadian Act* provides that the privileges, immunities, and powers with which the two Houses may be invested by an Act of the Canadian Parliament "shall not exceed" those possessed by the House of Commons in England. The provision in the draft Bill does not adopt this method of limiting parliamentary privilege, but leaves the matter entirely open to the wisdom of the Federal Parliament, which would be guided by circumstances in dealing with it. The Canadian principle was not discarded for the purpose of enabling the Federal Parliament to claim more extensive privileges than those of the House of Commons, but because it involved an obvious difficulty—that of determining whether the privileges to be claimed actually exceeded those of the latter House or not. It is not easy to define, with any exactness, the "privileges, immunities, and powers" to which parliamentary bodies are or may be entitled; and it would be unsafe to fix an arbitrary limitation upon them. The course adopted in this instance has been censured on the ground that it would enable the Federal Parliament to claim "absolutely unprecedented powers" for itself, and that those powers would probably be used in the direction of autocracy rather than that of popular freedom. There is nothing in the language of the Bill to justify that view of the matter.]

* The British North America Act, 1867, s. 18, amended by 38 and 39 Vic., c. 33, s. 1.

PART II.—THE SENATE.

Senate.

9. The Senate shall be composed of eight members for each State, directly chosen by the Houses of the Parliament of the several States during a Session thereof, and each Senator shall have one vote.

The Senators shall be chosen for a term of six years.

The names of the Senators chosen in each State shall be certified by the Governor to the Governor-General.

[The principle on which the Senate is to be elected is taken from the Constitution of the United States, which provides that the Senate shall be composed of two senators from each State, chosen by the Legislature thereof, for six years, and that each senator shall have one vote. The system adopted in the Dominion of Canada excludes the elective principle altogether; the Senate there being composed of not more than seventy-eight members, nominated for life by the Governor-General, and possessing a clear property qualification to the extent of over £800. In adopting the American form of Senate, the draft Bill recognises the fact that it is more consistent with democratic principles than the Canadian; and, moreover, that the experience of a century has amply confirmed the judgment of the statesmen who devised it. An Upper House, composed of men nominated by the Crown for life, on a property qualification, is no doubt more in accord with the principles of the English Constitution than one established on the American system; but such an institution would not be calculated to harmonise with the views of the Australian democracy in the present day.

This provision has been termed “anti-democratic,” because it places the right of electing the members of the Senate in the hands of the State Parliaments, instead of giving it to the electors direct. Such an objection is at once met by the fact that the principle on which it is proposed to form that body has stood the test of time in the most democratic of all governments. The most important point that has to be considered in connection with any political institution, is the prospect of its stability; and as the only two instances in which an Upper House has been

successfully constructed are the House of Lords and the American Senate, the framers of a Federal Constitution are practically bound to choose either one or the other as their working model. In this instance, they have clearly been guided by democratic principles in choosing the American Senate as the basis on which they propose to construct a second Chamber.

The reasons which prevailed with the American statesmen when they framed the Senate on principles unknown to the English Constitution, apply as forcibly to the circumstances of these colonies as they did to those of the States. It is not difficult to see that they were virtually constrained to adopt the course which seemed best to them. If the election of senators had been placed in the hands of the electors by whom the House of Representatives was returned, the great object in view in the construction of a second Chamber would have been defeated. For in a federal constitution, the States require to be represented as States, and that can only be effected by placing the election of their representatives in the hands of the State Legislatures. In our own case, the object of State representation could not be attained, if the election of senators were placed in the hands of the whole body of electors. We know, as a matter of daily observation, that the electors of each district habitually vote for their representatives exclusively in the interest of their own districts, and that questions of national importance are, as a rule, subordinated to those of purely local concern. If the election of senators were to be determined in the same way, the result would be that local interests would again predominate over the far weightier interests of the State.

By transferring the election of senators from the electors generally to their representatives in the State Parliaments, no violence would be done to democratic principles, for the election would still be virtually controlled by the people. But, on the other hand, it would be conducted on different principles and with different ends in view. Exclusively local interests would disappear, and votes would not be influenced by the prospect of obtaining "a share of the public plunder" for a particular district.

The great interests of the State would be protected and promoted; the men elected for the purpose would be chosen by the members of the State Parliaments on the ground of their proved capacity to represent it; and in each case, the senators would possess the confidence of the Parliament of their own State, which, through them, would be enabled to enforce its policy on State questions in the Senate.]

Mode of Election of Senators.

10. The Parliament of the Commonwealth may make laws prescribing a uniform manner of choosing the Senators. Subject to such laws, if any, the Parliament of each State may determine the time, place, and manner of choosing the Senators for that State by the Houses of Parliament thereof.

Failure of a State to choose Senators not to prevent business.

11. The failure of any State to provide for its representation in the Senate shall not affect the power of the Senate to proceed to the despatch of business.

Retirement of Senators.

12. As soon as practicable after the Senate is first assembled the Senators chosen for each State shall be divided by lot into two classes. The places of the Senators of the first class shall be vacated at the expiration of the third year, and the places of those of the second class at the expiration of the sixth year, from the commencement of their term of service as herein declared, so that one-half may be chosen every third year.

For the purposes of this section the term of service of a Senator shall begin on and be reckoned from the first day of January next succeeding the day of his election, except in the case of the first election, when it shall be reckoned from the first day of January preceding the day of his election. The election of Senators to fill the places of Senators retiring by rotation shall be made in the year preceding the day on which the retiring Senators are to retire.

[This provision for the periodical retirement of a certain proportion of the senators is also taken from the Constitution of the United States, with some variation. In the latter, the senators are divided into three classes; those of the first class retire at

the end of the second year, those of the second class at the end of the fourth year, and those of the third class at the end of the sixth year. Under this system, one-third of the whole body is chosen every second year. According to the plan adopted in the draft Bill, one-half of the whole number will retire every third year, and consequently half the Senate will be renewed at intervals of three years. The principle of retirement by rotation is unknown to our Constitution, but it is established in Victoria, South Australia, and Tasmania, with respect to the Legislative Council, which is elected.*]

How vacancies filled.

13. If the place of a Senator becomes vacant during the recess of the Parliament of the State which he represented the Governor of the State, by and with the advice of the Executive Council thereof, may appoint a Senator to fill such vacancy until the next Session of the Parliament of the State, when the Houses of Parliament shall choose a Senator to fill the vacancy.

Tenure of Seats of Senators elected to Senate owing to vacancies.

14. If the place of a Senator becomes vacant before the expiration of the term of service for which he was chosen the Senator chosen to fill his place shall hold the same only during the unexpired portion of the term for which the previous Senator was chosen.

* The rotation principle was in great favour among the Republicans of the seventeenth century. The earliest mention of it in English political history occurs in a pamphlet published by James Harrington—the author of “The Commonwealth of Oceana”—in 1660, which he entitled—“The Rota: or, a Model of a Free State, or Equal Commonwealth.” The nature of the scheme may be gathered from Anthony Wood’s account of the *Rota Club*, established by Harrington and his friends:—

“The model of it was that the third part of the Senat or House should rote out by Ballot every year (not capable of being elected again for three years to come), so that every ninth year the Senate would be wholly alter’d. No Magistrate was to continue above three years, and all to be chosen by Ballot. This club of Commonwealthsmen lasted till about 1659.”—*Athenæ Oxon.*, vol. II, p. 591.

Milton, who favoured a perpetual Senate, pointed out an objection to this scheme in his pamphlet on “The Ready and Easy Way to Establish a Free Commonwealth,” published shortly after Harrington’s appeared:—“For it appears not how this [retirement by rotation] can be done, without danger and mischance of putting out a great number of the best and ablest, in whose stead new elections may bring in as many raw, unexperienced, and otherwise affected, to the weakening and much altering for the worse of public transactions.”

Qualifications of Senator.

15. The qualifications of a Senator shall be as follows:—

- (1) He must be of the full age of thirty years, and must, when chosen, be an elector entitled to vote in some State at the election of Members of the House of Representatives of the Commonwealth, and must have been for five years at the least a resident within the limits of the Commonwealth as existing at the time when he is chosen ;
- (2) He must be either a natural born subject of the Queen, or a subject of the Queen naturalised by or under a law of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Parliament of one of the said Colonies, or of the Parliament of the Commonwealth, or of a State, at least five years before he is chosen.

Election of President of the Senate.

16. The Senate shall, at its first meeting and before proceeding to the despatch of any other business, choose a Senator to be the President of the Senate ; and as often as the office of President becomes vacant the Senate shall again choose a Senator to be the President ; and the President shall preside at all meetings of the Senate ; and the choice of the President shall be made known to the Governor-General by a deputation of the Senate.

The President may be removed from office by a vote of the Senate. He may resign his office ; and upon his ceasing to be a Senator his office shall become vacant.

Absence of President provided for.

17. In case of the absence of the President, the Senate may choose some other Senator to perform the duties of the President during his absence.

Resignation of place in Senate.

18. A Senator may, by writing under his hand addressed to the President, or if there is no President, or the President is absent from the Commonwealth, to the Governor-General, resign his place in the Senate, and thereupon the same shall be vacant.

Disqualification of Senator by absence.

19. The place of a Senator shall become vacant if for one whole Session of the Parliament he, without the permission of the Senate entered on its Journals, fails to give his attendance in the Senate.

Vacancy in Senate to be notified to Governor of State.

20. Upon the happening of a vacancy in the Senate the President, or if there is no President, or the President is absent from the Commonwealth, the Governor-General shall forthwith notify the same to the Governor of the State which the Senator whose place is vacated represented.

Questions as to qualifications and vacancies in Senate.

21. If any question arises respecting the qualification of a Senator or a vacancy in the Senate, the same shall be determined by the Senate.

Quorum of Senate.

22. Until the Parliament otherwise provides, the presence of at least one-third of the whole number of Senators, as provided by this Constitution, shall be necessary to constitute a meeting of the Senate for the exercise of its powers.

Voting in Senate.

23. Questions arising in the Senate shall be determined by a majority of votes, and the President shall in all cases be entitled to a vote; and when the votes are equal the question shall pass in the negative.

PART III.—THE HOUSE OF REPRESENTATIVES.

Constitution of House of Representatives.

24. The House of Representatives shall be composed of Members chosen every three years by the people of the several States, according to their respective numbers; and until the Parliament of the Commonwealth otherwise provides, each State shall have one Representative for every thirty thousand of its people.

Provided that in the case of any of the existing Colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, and Western Australia, and the Province of South Australia, until the number of the people is such as to entitle the State to four Representatives it shall have four Representatives.

Qualification of electors.

25. The qualification of electors of Members of the House of Representatives shall be in each State that which is prescribed by the law of the State as the qualification for electors of the more numerous House of the Parliament of the State.

[The main principles on which the House of Representatives is to be elected are taken from the Constitution of the United

States. The American House of Representatives, in its earliest form, was composed of members chosen every second year by the people of the several States ; the number of members was not to exceed "one for every thirty thousand" of the population ; the representation was apportioned among the States according to their numbers, a fresh apportionment taking place every ten years ; and the electors in each State were required to have "the qualifications requisite for electors of the most numerous branch of the State Legislature." These principles are not less democratic, in their origin and character, than those which relate to the composition and election of the Senate ; but they have been described here as "anti-democratic," mainly on the ground that the electoral system is not based on the principle of "one man one vote."

A little consideration of the matter will show that the authors of the draft Bill had good reasons for following the precedent set them by the American statesmen. In both cases there was the same difficulty to be met, arising from the different electoral systems established in the different States. The founders of the American Union did not think it wise or prudent to prescribe a uniform system of qualifications as the essential basis on which the elections for the House of Representatives were to be conducted. Such a procedure was practically impossible, for many reasons, but chiefly because it would have involved a violation of a fundamental principle of the Constitution—that the internal affairs of the States were not to be interfered with where interference could be safely avoided. The soundness of their judgment becomes evident when we recollect that a jealous regard for independence in matters of internal government has always formed a leading feature of State politics. The same feeling exists among these colonies, and is certain to make itself felt in every attempt to frame a federal constitution. It may be safely asserted that, if the draft Bill had contained any provisions involving a reform of the electoral system in the colonies, it would have been pointed out as another "strangely impertinent interference" with their rights.]

Provision for ease of persons not allowed to vote.

26. When in any State the people of any race are not entitled by law to vote at elections for the more numerous House of the Parliament of the State, the Representation of that State in the House of Representatives shall be reduced in the proportion which the number of people of that race in the State bears to the whole number of the people of the State.

Mode of calculating number of Members.

27. When upon the apportionment of Representatives it is found that after dividing the number of the people of a State by the number in respect of which a State is entitled to one Representative there remains a surplus greater than one-half of such number, the State shall have one additional Representative.

Representatives in first Parliament.

28. The number of members to be chosen by each State at the first election shall be as follows: [*To be determined according to latest statistical returns at the date of the passing of the Act.*]

Periodical reapportionment.

29. A fresh apportionment of Representatives to the States shall be made after each Census of the people of the Commonwealth, which shall be taken at intervals not longer than ten years. But a fresh apportionment shall not take effect until the then next General Election.

Increase of number of House of Representatives.

30. The number of Members of the House of Representatives may be from time to time increased or diminished by the Parliament of the Commonwealth, but so that the proportionate representation of the several States, according to the numbers of their people, and the minimum number of Members, prescribed by this Constitution, for any State shall be preserved.

Electoral Divisions.

31. The electoral divisions of the several States for the purpose of returning members of the House of Representatives shall be determined from time to time by the Parliaments of the several States.

Qualifications of Member of House of Representatives.

32. The qualifications of a Member of the House of Representatives shall be as follows :—

- (1) He must be of the full age of twenty-one years, and must when elected be an elector entitled to vote in some State at the election of members of the House of Representatives, and must have been for three years at the least a resident within the limits of the Commonwealth as existing at the time when he is elected ;
- (2) He must be either a natural born subject of the Queen, or a subject of the Queen naturalised by or under a law of the Parliament of Great Britain and Ireland, or of the Parliament of one of the said Colonies, or of the Parliament of the Commonwealth, or of a State, at least three years before he is elected.

Disqualification of Senators.

33. A Senator shall not be capable of being elected or of sitting as a Member of the House of Representatives.

Election of Speaker of House of Representatives.

34. The House of Representatives shall, at its first meeting after every General Election, and before proceeding to the despatch of any other business, choose a Member to be the Speaker of the House, and as often as the office of Speaker becomes vacant the House shall again choose a Member to be Speaker ; and the Speaker shall preside at all meetings of the House of Representatives ; and the choice of a Speaker shall be made known to the Governor-General by a deputation of the House.

The Speaker may be removed from office by a vote of the House, or may resign his office.

Absence of Speaker provided for.

35. In case of the absence of the Speaker, the House of Representatives may choose some other Member to perform the duties of the Speaker during his absence.

Resignation of place in House of Representatives.

36. A Member of the House of Representatives may, by writing under his hand addressed to the Speaker, or if there is no Speaker, or he is absent from the Commonwealth, to the Governor-General, resign his place in the House of Representatives, and thereupon the same shall be vacant.

Disqualification of Member by absence.

37. The place of a Member of the House of Representatives shall become vacant if for one whole Session of the Parliament he, without permission of the House of Representatives entered on its Journals, fails to give his attendance in the House.

Issue of new writs.

38. Upon the happening of a vacancy in the House of Representatives, the Speaker shall, upon a resolution of the House, issue his writ for the election of a new member.

In the case of a vacancy by death or resignation happening when the Parliament is not in Session, or during an adjournment of the House for a period of which a part longer than seven days is unexpired, the Speaker, or if there is no Speaker, or he is absent from the Commonwealth, the Governor-General shall issue, or cause to be issued, a writ without such resolution.

Quorum of House of Representatives.

39. Until the Parliament otherwise provides the presence of at least one-third of the whole number of the Members of the House of Representatives shall be necessary to constitute a meeting of the House for the exercise of its powers.

Voting in House of Representatives.

40. Questions arising in the House of Representatives shall be determined by a majority of votes other than that of the Speaker; and when the votes are equal, but not otherwise, the Speaker shall have a casting vote.

Duration of House of Representatives.

41. Every House of Representatives shall continue for three years from the day appointed for the first meeting of the House, and no longer, subject, nevertheless, to be sooner dissolved by the Governor-General.

The Parliament shall be called together not later than thirty days after the day appointed for the return of the Writs for a General Election.

Writs for General Election.

42. For the purpose of holding General Elections of Members to serve in the House of Representatives the Governor-General may cause Writs to be issued by such persons, in such form, and addressed to such Returning Officers, as he thinks fit.

Continuance of existing Election Laws until the Parliament otherwise provides.

43. Until the Parliament of the Commonwealth otherwise provides, the laws in force in the several States for the time being, relating to the following matters, namely: The manner of conducting Elections for the more numerous House of the Parliament, the proceedings at such elections, the oaths to be taken by voters, the Returning Officers, their powers and duties, the periods during which Elections may be continued, the execution of new Writs in case of places vacated otherwise than by dissolution, and offences against the laws regulating such Elections, shall respectively apply to Elections in the several States of Members to serve in the House of Representatives.

Questions as to qualifications and vacancies.

44. If any question arises respecting the qualification of a Member or a vacancy in the House of Representatives, the same shall be heard and determined by the House of Representatives.

PART IV.—PROVISIONS RELATING TO BOTH HOUSES.

Allowance to Members.

45. Each member of the Senate and House of Representatives shall receive an annual allowance for his services, the amount of which shall be fixed by the Parliament from time to time. Until other provision is made in that behalf by the Parliament the amount of such annual allowance shall be five hundred pounds.

Disqualifications of Members.

46. Any person—

- (1) Who has taken an oath or made a declaration or acknowledgment of allegiance, obedience, or adherence to a Foreign Power, or has done any act whereby he has become a subject or citizen or entitled to the rights or privileges of a subject or a citizen of a Foreign Power; or
- (2) Who is an undischarged bankrupt or insolvent, or a public defaulter; or
- (3) Who is attainted of treason, or convicted of felony or of any infamous crime;

shall be incapable of being chosen or of sitting as a Senator or Member of the House of Representatives until the disability is removed by a grant of a discharge, or the expiration or remission of the sentence, or a pardon, or release, or otherwise.

Place to become vacant on happening of certain disqualifications.

47. If a Senator or Member of the House of Representatives—

- (1) Takes an oath or makes a declaration or acknowledgment of allegiance, obedience, or adherence to a Foreign Power, or does any act whereby he becomes a subject or citizen, or entitled to the rights or privileges of a subject or citizen, of a Foreign Power; or
- (2) Is adjudged bankrupt or insolvent, or takes the benefit of any law relating to bankrupt or insolvent debtors, or becomes a public defaulter; or
- (3) Is attainted of treason, or convicted of felony or of any infamous crime;

his place shall thereupon become vacant.

Disqualifying contractors and persons interested in contracts.—Proviso exempting members of trading companies.

48. Any person who directly or indirectly himself, or by any person in trust for him, or for his use or benefit, or on his account, undertakes, executes, holds, or enjoys, in the whole or in part, any agreement for or on account of the Public Service of the Commonwealth, shall be incapable of being chosen or of sitting as a Senator or Member of the House of Representatives while he executes, holds, or enjoys the agreement, or any part or share of it, or any benefit or emolument arising from it.

If any person, being a Senator or Member of the House of Representatives, enters into any such agreement, or having entered into it continues to hold it, his place shall thereupon become vacant.

But this section does not extend to any agreement made, entered into, or accepted, by an incorporated company consisting of more than twenty persons if the agreement is made, entered into, or accepted for the general benefit of the company.

Place to become vacant on accepting office of profit.—Exceptions.

49. If a Senator or Member of the House of Representatives accepts any office of profit under the Crown, not being one of the offices of State held during the pleasure of the Governor-General, and the holders of which are by this Constitution declared to be capable of being chosen and of sitting as Members of either House of Parliament, or accepts any pension payable out of any of the revenues of the Commonwealth during the pleasure of the Crown, his place shall thereupon become vacant, and no person holding any such office,

except as aforesaid, or holding or enjoying any such pension, shall be capable of being chosen or of sitting as a Member of either House of the Parliament :

But this provision does not apply to a person who is in receipt only of pay, half-pay, or a pension, as an Officer of the Queen's Navy or Army, or who receives a new Commission in the Queen's Navy or Army, or an increase of pay on a new Commission, or who is in receipt only of pay as an officer or member of the Military or Naval Forces of the Commonwealth and whose services are not wholly employed by the Commonwealth.

Penalty for sitting when disqualified.

50. If any person by this Constitution declared to be incapable of sitting in the Senate or House of Representatives sits as a Senator or Member of the House of Representatives, he shall, for every day on which he sits, be liable to pay the sum of one hundred pounds to any person who may sue for it in any Court of competent jurisdiction.

Standing Rules and Orders to be made.

51. The Senate and House of Representatives may from time to time prepare and adopt such Standing Rules and Orders as may appear to them respectively best adapted—

- (1) For the orderly conduct of the business of the Senate and House of Representatives respectively :
- (2) For the mode in which the Senate and House of Representatives shall confer, correspond, and communicate with each other relative to Votes or proposed Laws adopted by or pending in the Senate or House of Representatives respectively :
- (3) For the manner in which Notices of proposed Laws, Resolutions, and other business intended to be submitted to the Senate and House of Representatives respectively may be published for general information :
- (4) For the manner in which proposed Laws are to be introduced, passed, numbered, and, intituled in the Senate and House of Representatives respectively :
- (5) For the proper presentation of any Laws passed by the Senate and House of Representatives to the Governor-General for his assent : and
- (6) Generally for the conduct of all business and proceedings of the Senate and House of Representatives severally and collectively.

[This provision is taken from our Constitution Act ; but it omits the concluding part of the section (35) which requires the rules and orders to be laid before the Governor, and to be approved by him, before they can take effect. In this respect the draft Bill again follows the democratic lead of the American Constitution, which gives each House the power to determine the rules of its proceedings, without reference to any higher authority.]

PART V.—POWERS OF THE PARLIAMENT.

[The legislative powers proposed to be conferred on the Federal Parliament will extend only to certain classes of subjects, which are enumerated for the purpose of distinguishing its powers from those of the State Parliaments. The draft Bill does not attempt to define their legislative powers, which are consequently left untouched, except so far as relates to the specified subjects with which the Federal Parliament is expressly authorised to deal. In this respect, the Bill adopts the principle established in the United States, where the federal powers conferred by the Constitution are strictly delegated powers ; the result being that, as to matters not specified as being within the exclusive jurisdiction of Congress, the States retain all the powers vested in them by their respective Constitutions.

The Canadian Act is based on a very different principle ; it enumerates and defines the subjects with respect to which the Provincial Legislatures have exclusive powers of legislation, and gives the Dominion Parliament authority to legislate on all matters outside them ; at the same time specifying, “for greater certainty, but not so as to restrict the generality” of that power, the various classes of subjects with respect to which it should have exclusive authority to deal. The effect of an arbitrary division of power is to surround the Provincial Legislatures with a system of limitations, and consequently to give rise to frequent conflicts of opinion with respect to their powers as compared with those of the Parliament above them.]

Legislative powers of the Parliament.

52. The Parliament shall, subject to the provisions of this Constitution, have full power and authority to make all such Laws as it thinks necessary for the peace, order, and good government of the Commonwealth, with respect to all or any of the matters following, that is to say :—

1. The regulation of Trade and Commerce with other Countries, and among the several States ;
2. Customs and Excise and bounties, but so that duties of Customs and Excise and bounties shall be uniform throughout the Commonwealth, and that no tax or duty shall be imposed on any goods exported from one State to another ;
3. Raising money by any other mode or system of taxation ; but so that all such taxation shall be uniform throughout the Commonwealth ;
4. Borrowing money on the public credit of the Commonwealth ;
5. Postal and Telegraphic Services ;
6. The Military and Naval Defence of the Commonwealth and the several States and the calling out of the Forces to execute and maintain the laws of the Commonwealth, or of any State or part of the Commonwealth ;
7. Munitions of War ;
8. Navigation and Shipping ;
9. Ocean Beacons and Buoys, and Ocean Light-houses and Light-ships.
10. Quarantine ;
11. Fisheries in Australian waters beyond territorial limits ;
12. Census and Statistics ;
13. Currency, Coinage, and Legal Tender ;
14. Banking, the Incorporation of Banks, and the Issue of Paper Money ;
15. Weights and Measures ;
16. Bills of Exchange and Promissory Notes ;
17. Bankruptcy and Insolvency ;
18. Copyrights and Patents of Inventions, Designs, and Trade Marks ;
19. Naturalization and Aliens ;

20. The Status in the Commonwealth of Foreign Corporations, and of Corporations formed in any State or part of the Commonwealth ;
21. Marriage and Divorce ;
22. The Service and Execution throughout the Commonwealth of the Civil and Criminal Process and Judgments of the Courts of the States ;
23. The recognition throughout the Commonwealth of the Laws, the Public Acts and Records, and the Judicial Proceedings, of the States ;
24. Immigration and Emigration ;
25. The influx of Criminals ;
26. External affairs and Treaties ;
27. The relations of the Commonwealth to the Islands of the Pacific ;
28. River Navigation with respect to the common purposes of two or more States, or parts of the Commonwealth ;
29. The control of Railways with respect to transport for the purposes of the Commonwealth ;
30. Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the Law shall extend only to the State or States by whose Parliament or Parliaments the matter was referred, and to such other States as may afterwards adopt the Law ;
31. The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States concerned, of any Legislative powers with respect to the affairs of the territory of the Commonwealth, or any part of it, which can at the date of the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia ;
32. Any matters necessary or incidental for carrying into execution the foregoing powers and any other powers vested by this Constitution in the Parliament or Executive Government of the Commonwealth or in any department or officer thereof.

Exclusive powers of the Parliament.

53. The Parliament shall, also, subject to the provisions of this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to the following matters :—

1. The affairs of people of any race with respect to whom it is deemed necessary to make special laws not applicable to the general community ; but so that this power shall not extend to authorise legislation with respect to the affairs of the aboriginal native race in Australia and the Maori race in New Zealand ;
2. The government of any territory which may by surrender of any State or States and the acceptance of the Parliament become the seat of Government of the Commonwealth, and the exercise of like authority over all places acquired by the Commonwealth, with the consent of the Parliament of the State in which such places are situate, for the construction of forts, magazines, arsenals, dockyards, quarantine stations, or for any other purposes of general concern ;
3. Matters relating to any Department or Departments of the Public Service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth ;
4. Such other matters as are by this Constitution declared to be within the exclusive powers of the Parliament.

Money Bills.

Money Bills.

54. Laws appropriating any part of the public revenue, or imposing any tax or impost shall originate in the House of Representatives.

Appropriation and Tax Bills.

55. (1) The Senate shall have equal power with the House of Representatives in respect of all proposed Laws, except Laws imposing taxation and Laws appropriating the necessary supplies for the ordinary annual services of the Government which the Senate may affirm or reject, but may not amend. But the Senate may not amend any proposed Law in such a manner as to increase any proposed charge or burden on the people.

(2) Laws imposing taxation shall deal with the imposition of taxation only.

(3) Laws imposing taxation except Laws imposing duties of Customs on imports shall deal with one subject of taxation only.

(4) The expenditure for services other than the ordinary annual services of the Government shall not be authorised by the same Law as that which appropriates the supplies for such ordinary annual services, but shall be authorised by a separate Law or Laws.

(5) In the case of a proposed Law which the Senate may not amend, the Senate may at any stage return it to the House of Representatives with a message requesting the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make such omissions or amendments, or any of them, with or without modifications.

[In dealing with the question of money bills, the draft Bill has marked out a plan of procedure which differs from the established practice in England, in the United States, in Canada, and in this colony. It represents the result arrived at after a considerable conflict of opinion as to the rights of the two Houses on the question involved. The Constitution Acts of this colony and of Victoria, which were framed with the intention of embodying the practice of the English Parliament as far as possible, provide merely that all money bills shall originate in the Assembly. The Canadian Act, which is based on the same principle, also follows the same precedent. But the Constitution of the United States, while providing that "all bills for raising revenue shall originate in the House of Representatives," gives the other House a power unknown to English practice by adding—"but the Senate may propose or concur with amendments, as in other bills." These words had the effect of placing both Houses on the same level as regards money bills, with the single exception as to the right of initiating them. The power of proposing amendments has been freely exercised by the Senate at all times; but whatever differences may arise between the two Houses are usually settled by means of conference and compromise.*

The plan adopted in the draft Bill has the sanction of both the English and American systems. On the one hand, it follows the English practice by saying that the Senate may reject a

* Bryce on the American Commonwealth, vol. I, p.136.

money bill, but may not amend it. On the other hand, it follows the American practice, to some extent, by saying that where the Senate may not amend a money bill, it may return it to the lower House at any stage, with a message requesting the omission or amendment of any items or provisions in it. But that is all it can do ; because this power is restricted by the further provision that the Lower House, if it thinks fit, may make such omissions or amendments, or modify them. Those words convey a clear limitation of the right of requesting amendments ; because they reserve the power of finally dealing with them to the Lower House.

This course of procedure is recommended by the fact that it has been in force in South Australia for many years past. It was originally adopted there as a compromise of the difficulties which had arisen between the two Houses on the subject of money bills ; and since that time it has been found to work so effectively that it is now regarded as an established practice. A proof of the success which has attended it may be seen in the fact that, at the first meeting of the Parliament of Western Australia, it was resolved to adopt it as a means of averting differences of opinion between the two Houses on financial questions.

The evidence in its favour thus afforded by the representatives of two colonies was strong enough to justify the adoption of this practice in the draft Bill. But in face of this testimony, it is confidently asserted that, although it has been successfully adopted elsewhere for the purpose of averting collisions, it will infallibly give rise to them when the Federal Constitution comes into existence. The Assembly was recently told that, "in this matter, upon which there should be no risk of collision or deadlock, there is every opening for incessant quarrels between the different provinces in the Senate." This statement was made without any attempt to support it by either argument or evidence. Its value may be ascertained by comparing it with the statement made by the Premier of South Australia, when speaking on the subject in the Convention :—

I would say that, considering the compromise arrived at was the same as that arrived at in South Australia over twenty years ago, between the

Legislative Council and the House of Assembly, and that it has worked so exceedingly well for that period, we, in making the compromise contained in the bill, have not departed from any powers we possess ; that is, we have not gone outside the colonies to adopt a mode by which we may get over the difficulties of co-ordinate powers between the two Houses. We have, adopted a system which has been in operation in one of the colonies for many years with very happy results. Therefore, we have just as much right to say that by adopting the South Australian compromise, which has worked so well for so many years, we have adopted a compromise which will work well for the Commonwealth of the future, as we have to say that, if we had adopted the American system, which, I contend, exists under different conditions and apart from responsible government, it also would have worked well.*

This evidence was confirmed by that of a delegate from Western Australia, who said :—

All I can say is that, in the first assembling of our two Houses in Western Australia, when this very question came up, we carefully studied matters in South Australia ; and we were convinced, from the frequent, the effective, and the conciliatory application of the system, that it was a course of procedure that deserved consideration. The result was that, in the very first question that arose between our two Houses, we adopted the South Australian mode of procedure, and, in consequence, an amendment of a highly desirable character was made in legislation relating to finance. Therefore, I look upon the practice as the established practice of Western Australia as well as of South Australia.†]

Recommendation of money votes.

56. It shall not be lawful for the House of Representatives to pass any vote, resolution, or Law for the appropriation of any part of the public revenue, or of the produce of any tax or impost, to any purpose that has not been first recommended to that House by message of the Governor-General in the Session in which the vote, resolution, or Law, is proposed.

Royal Assent.

Royal assent to Bills.

57. When a law passed by the Parliament is presented to the Governor-General for the Queen's assent, he shall declare, according to his discretion, but subject to the provisions of this Constitution, either that he assents to it in the Queen's name, or that he withholds assent, or that he reserves the Law for the Queen's pleasure to be made known.

* Official Report of the Debates, p. 922.

† Ibid, p. 741.

The Governor-General may return to the Parliament any Law so presented to him, and may transmit therewith any amendments which he may desire to be made in such Law, and the Parliament may deal with such proposed amendments as it thinks fit.

[The power of suggesting amendments has been described as an "extraordinary" and a "dangerous" one, even if confined to verbal alterations of the bill. Although there is no provision to that effect in our Constitution Act, there is one in the Constitution Act of Victoria (s. 36), and also in that of South Australia (s. 28)—worded as follows:—

It shall be lawful for the Governor to transmit by message to the Council or Assembly, for their consideration, any amendments which he shall desire to be made in any bill presented to him for her Majesty's assent; and all such amendments shall be taken into consideration in such convenient manner as shall, by the rules and orders aforesaid, be in that behalf provided.

The provision in the draft Bill which confers the power of proposing amendments on the Governor-General was, no doubt, suggested by this clause, which has stood the test of thirty-five years' experience in the neighbouring colonies. That there are good reasons for taking advantage of that experience cannot be denied by any one acquainted with the character of our legislation. However well and carefully a bill may be drafted in the first instance, the alterations made in it when the Houses are in Committee usually introduce a great deal of doubt and difficulty as to the precise meaning of the clauses altered, the result being that the intentions of the Legislature are frequently defeated. Such a result, of course, is not anticipated by the legislators who propose the alterations, nor is it observed until the law itself has become the subject of discussion. Under the present system, no means are provided for curing the defects thus occasioned, or preventing the mischievous consequences to which they occasionally give rise.

The established practice in the matter is this: as soon as a bill has been passed by both Houses, it is sent by the Clerk of the

Parliaments to the Governor, who thereupon directs it to be sent to the Attorney-General with an official letter requesting him to peruse it, "with a view of ascertaining whether there is any objection to his Excellency the Governor giving his assent to it; or whether he is required, under the provisions of the Constitution or any other Acts, or the Royal Instructions, to withhold his assent to the bill, or to reserve it for the signification of her Majesty's pleasure." The questions which the Attorney-General is requested to answer being purely constitutional, he confines his attention to the constitutional aspects of the bill; so that he does not undertake to say whether it is defective from a technical point of view, nor does he pretend to suggest any amendments for the purpose of improving it. If there is no constitutional objection to it, he returns it with an official letter, stating his opinion to that effect; whereupon his Excellency gives his assent to the bill, and it then becomes law.

Under the system proposed by the draft Bill, this practice would be altered so far that the Attorney-General of the Commonwealth would be requested to examine the bills sent to him by the Governor-General from a technical as well as a constitutional point of view; to point out any defects in them he might notice, and to suggest such alterations as he might think necessary for the purpose of carrying out the intentions of Parliament with respect to the bills. Any alterations which he might propose would probably be considered by the Federal Executive Council, who would then advise the Governor-General on the subject. On such occasions, the Council would perform the duties of a Court of Revision, and with this result—that instead of the bills passed by both Houses being finally dealt with as a matter of routine, they would undergo an examination which would probably reveal any errors or oversights that might have previously escaped notice. The attention of Parliament would then be directed to any matter that might require it, so that the true purpose of every bill would be tolerably certain of accomplishment. Functions of this kind would be strictly constitutional. There is no pretence for the supposition that the power of

proposing amendments under such conditions, would be either prejudicial to the liberty of the people, or derogatory to the dignity of Parliament.]

Disallowance by Order in Council of Law assented to by Governor-General.

58. When the Governor-General assents to a Law in the Queen's name he shall by the first convenient opportunity send an authentic copy to the Queen, and if the Queen in Council within two years after receipt thereof thinks fit to disallow the Law, such disallowance being made known by the Governor-General, by speech or message, to each of the Houses of the Parliament, or by proclamation, shall annul the Law from and after the day when the disallowance is so made known.

Signification of Queen's Pleasure on Bill reserved.

59. A Law reserved for the Queen's pleasure to be made known with respect to it shall not have any force unless and until within two years from the day on which it was presented to the Governor-General for the Queen's assent, the Governor-General makes known by speech or message to each of the Houses of the Parliament, or by proclamation, that it has received the assent of the Queen in Council.

An entry of every such speech, message, or proclamation shall be made in the journal of each House, and a duplicate thereof duly attested shall be delivered to the proper officer to be kept among the records of the Parliament.

CHAPTER II.

THE EXECUTIVE GOVERNMENT.

Executive power to be vested in the Queen.

1. The Executive power and authority of the Commonwealth is vested in the Queen, and shall be exercised by the Governor-General as the Queen's Representative.

[It is contended that this clause, as it stands, vests the Executive power in the Governor-General independently of the Executive; and that it ought to have concluded with the words "acting by and with the advice of the Federal Executive Council." If these words had been inserted, they would not amount to anything more than surplusage. Parliamentary Government being established as the basis of the Federation, the Governor-General

could not act otherwise than "by and with the advice of the Federal Executive Council," unless he was prepared to take the responsibility of acting without it or against it. The corresponding clause of the Canadian Act says that "the Executive Government and authority of and over Canada is hereby declared to continue and be vested in the Queen." It says nothing about the Governor-General; the framers of the Act evidently thinking it unnecessary to declare in set terms that the authority of the Queen should be exercised by him, or to prescribe the mode in which he should exercise it under parliamentary government.]

Constitution of Executive Council for Commonwealth.

2. There shall be a Council to aid and advise the Governor-General in the government of the Commonwealth, and such Council shall be styled the Federal Executive Council; and the persons who are to be Members of the Council shall be from time to time chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure.

[It would appear from these provisions that the Federal Executive Council is intended to resemble, in character and functions, the Privy Council of Canada. The number of its members is not limited, so that it will probably exceed that of the ministers appointed to conduct the departments of State; and they are not required to sit in either House. The clause which constitutes the Council is taken from one in the Canadian Act (s. 11), which provides for the establishment of a Privy Council, officially termed "the Queen's Privy Council for Canada." At the present time it numbers fifty members, of whom fifteen are members of the Cabinet, including two without office. The other members of the Council include the High Commissioner for Canada in London, three Lieutenant-Governors, two Chief Justices, three Judges, several ex-Cabinet Ministers, Queen's Counsel, senators, members of the lower House, and other men of distinction. This body is evidently formed on the model of the Privy Council of England, which has always comprised a large number of distinguished men, and out of which has been evolved, by a series of constitutional developments, the body familiarly known

as the Cabinet. The Canadian Council, therefore, is a practical illustration of the statement in the preamble of the Act—that the Constitution was designed to be “similar in principle to that of the United Kingdom.” It is in keeping with this principle that the Act makes no mention of the Cabinet or Executive, and consequently that body—by which the whole Federal Government is administered—is, technically speaking, unknown to the statute law of Canada.]

Application of provisions referring to Governor-General.

3. The provisions of this Constitution referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council.

[It is argued that this clause does not sufficiently provide for the action of responsible government, because the term “Governor General in Council” is used only in two clauses, referring to matters of administration—the establishment of departments, and the appointment and removal of officers. It is not used at all, it is said, in connection with any great act of executive power. This objection arises from a singular misapprehension as to the meaning of the clause in question. In the first place, it is nothing more than an interpretation clause; the object being the removal of doubts as to the definition of the term “Governor-General in Council.” The corresponding clause in the Canadian Act states that “the provisions of this Act referring to the Governor-General in Council shall be construed as referring to the Governor-General acting by and with the advice of the Queen’s Privy Council for Canada.” There was a clear necessity for a statutory interpretation of the term “Privy Council,” because that body was a new institution in Canada when the Act was passed; and in the absence of some such definition, doubt might have arisen as to the meaning of the words “Governor-General in Council.” There is a similar necessity for defining the term here, because “the Federal Executive Council” is, at present, an institution unknown to the law in Australia.

In the second place, the reason why the draft Bill speaks sometimes of a “Governor-General,” and at other times of a

“Governor-General in Council” is because, in the former case, he is referred to in his capacity as the Queen’s Representative and the depositary of the prerogatives of the Crown; while in the latter case, he is referred to in his capacity as the head of the local Executive Council, assembled for the purpose of transacting official business. For instance, the command in chief of all the military and naval forces is vested by clause 9 “in the Governor-General as the Queen’s Representative”; and the corresponding clause (15) in the Canadian Act enacts that the command-in-chief “is hereby declared to continue and be vested in the Queen.” That form of expression distinctly recognises the constitutional doctrine that the chief command of the military and naval forces of the Empire is vested in the Crown, as one of its prerogatives; although, as a matter of fact, the actual administration of the forces is controlled by a Secretary of State, who is immediately responsible to Parliament.

The objection taken to the language of the draft Bill in this matter might be applied with equal force to our own Constitution Act. The power of appointment to public offices under the Government is vested, by section 37 of that Act, “in the Governor, with the advice of the Executive Council”; but the power of appointing a President of the Legislative Council, of summoning a Legislative Assembly, of fixing the place and time for holding sessions of both Houses, of proroguing and dissolving, is vested (sections 7, 9, 30) in “the Governor.” As a matter of fact, we know that in each of these cases the power is really exercised by the Governor with the advice of the Executive Council. The reason why the Act does not say in express terms that it shall be so exercised, is because it would not be constitutionally correct to do so—the thing to be done in each case being clearly an exercise of the prerogative. In the case of appointments to subordinate offices, the act is an administrative one, which requires the sanction of the Governor as President of the Executive Council.]

Ministers of State.—May sit in Parliament.

4. For the administration of the Executive government of the Commonwealth, the Governor-General may, from time to time, appoint

Officers to administer such Departments of State of the Commonwealth] as the Governor-General in Council may from time to time establish, and such officers shall hold office during the pleasure of the Governor-General, and shall be capable of being chosen and of sitting as Members of either House of the Parliament.

Such Officers shall be Members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth.

Number of Ministers.

5. Until other provision is made by the Parliament, the number of such Officers who may sit in the Parliament shall not exceed seven, who shall hold such offices, and by such designation, as the Parliament from time to time prescribes by Law, or, in the absence of any such Law, as the Governor-General from time to time directs.

[At this point, it will be seen, the draft Bill differs from the Canadian Act by making special provision for the appointment of Ministers charged with the administration of the various departments of State, of whom not more than seven, in the first instance, will have seats in the Federal Parliament. As it was not absolutely necessary that special provision should be made on this subject—seeing that the establishment of parliamentary government on the English model involves the introduction of responsible ministers—it may be inferred that the object in view was to leave no room for doubt as to the nature as well as the form of government intended to be established. The terms of the clauses referred to (4 and 5) make it sufficiently clear that the Federal Government will be administered on the principles which characterise responsible government in England and the colonies. On that point there can be no doubt. Although the Canadian Act says nothing whatever about Cabinet Ministers, or responsible government, we know that the Dominion is governed on precisely the same principles as the mother country; and seeing that the provisions of the draft Bill are explicit on the subject, there is no reason to suppose that any other form of government is contemplated by it.

Notwithstanding the positive terms in which this intention is expressed, it is contended that the draft Bill not only makes no provision for the establishment of responsible government,

but designedly omits or excludes it. There is nothing whatever to support this view of the matter, which seems to owe its origin to the academical opinions expressed by certain members of the Convention with reference to the value of responsible government as a political system. The discussion on the subject was of a purely speculative nature, such as might be expected to take place in a meeting of statesmen convened for the purpose of discussing the principles and practice of government, with a view to the framing of a Federal Constitution. Responsible government may be said to have been on its trial in these colonies for thirty-five years; and it was inevitable that, in such an assemblage as the Convention, which included statesmen from all the colonies, the merits of that system should be freely criticised. It is a totally different thing to say that the speakers who referred to it were opposed to its introduction in the scheme of government they had under consideration; that they fought against its introduction; and that they succeeded in excluding it from the draft Bill. The use of the term "responsible" was objected to by the chairman of the drafting committee on the ground that it was not necessary, being nothing more than an epithet, and that the thing itself was sufficiently provided for. It is only necessary to point to the Canadian Act, and the Constitution Act of this colony, to show that that view of the matter is a sound one. In neither of those Acts is there any special provision for the establishment of responsible government, and yet it has been in force under each of them ever since they were passed.

It is also said that the word "responsible" was omitted in order that another form of government might be introduced at some time hereafter, if it should be found desirable to do so. Supposing that to have been the case—and there is nothing in the draft Bill to warrant the supposition—any change in that direction would have to be made under the conditions imposed with respect to amendments of the Constitution, that is to say, by the deliberate judgment of the people, expressed by their representatives in Parliament, and in special Conventions sum-

moned for the purpose. And further, even supposing that any such ultimate change was kept in view by the drafting committee as one of the possibilities of the situation, such a treatment of the subject is not fairly open either to suspicion or censure. They were bound to recognise the fact that change is one of the laws of existence in the political as well as in the physical world; and that no Constitution, which is not elastic enough to adapt itself to circumstances, can hope to survive "the sad vicissitude of things."

The misapprehension which has arisen on this point appears to have been increased by an argument raised during a discussion in the Convention on the word "responsible." The late Attorney-General of Victoria, bearing in mind some remarks made by the judges of the Supreme Court, in *Ah Toy's* case, on the fact that the word "responsible" does not appear in the Constitution Act, desired to introduce words into clause 4 which would have the effect of placing the Federal Ministers in the same constitutional position as that occupied by Ministers in England—in order that they might, when the occasion arose, exercise the prerogatives of the Crown as freely as they are exercised in England. The question debated in Victoria was, whether Ministers of the Crown in that colony possessed the power to prevent Chinese from landing; it was held that they had not; and from that decision the Victorian Government appealed to the Privy Council, which allowed the appeal. To meet such contingencies as this, the Attorney-General of Victoria moved in the Convention that the words, "and shall be the Queen's Ministers of State for the Commonwealth," should be added to clause 4. That was done, and he was satisfied that all doubt as to the position of Ministers was removed by those words. It follows, therefore, that their powers and functions will be in all respects analogous to those of Cabinet Ministers in England.]

Salaries of Ministers.

6. Until other provision is made by the Parliament there shall be payable to the Queen, out of the Consolidated Revenue Fund of the Commonwealth, for the salaries of such Officers, the sum of fifteen thousand pounds per annum.

Appointment of Civil Servants.

7. Until other provision is made by the Parliament, the appointment and removal of all other officers of the Government of the Commonwealth shall be vested in the Governor-General in Council, except officers whose appointment may be delegated by the Governor-General in Council to some other officer or person.

Authority of Executive.

8. The Executive power and authority of the Commonwealth shall extend to the execution of the provisions of this Constitution, and the Laws of the Commonwealth.

Command of Military and Naval Forces.

9. The Command in Chief of all Military and Naval Forces of the Commonwealth is hereby vested in the Governor-General as the Queen's Representative.

[An objection has been raised to this provision on the ground that it does not limit the purposes for which the forces of the Commonwealth are to be available. As there is only one conceivable purpose for which military and naval forces can be raised in the colonies—that is, defence against invasion—it cannot be considered a defect in the draft Bill that it omits to specify that purpose. The task of framing regulations for the government of the forces, and providing generally for the conduct of matters relating to defence, is properly left to the Federal Parliament. The Canadian Act is equally silent on the subject, and for the same reason. One of the first measures passed by the first Dominion Parliament was the “Canada Militia and Defence Act, 1868,” which, according to Todd, secures the exercise of all powers under the Act in a constitutional manner. Matters of immediate concern to the Queen's regular forces, military and naval, while serving in Canada, are left to the direct control of the Imperial authorities; while those which concern the disposition and management of purely local forces are regulated by the Governor-General, with the advice or consent of his Privy Council or Cabinet. The local administration is placed under the charge of a department, known as the “Department of Militia and Defence,” which is represented in Parliament by the “Minister of Militia.” Reasoning on this analogy,

the framers of the draft Bill followed a sound precedent when they left subordinate questions to be provided for by the Federal Parliament.]

Immediate assumption of control of certain Departments.

10. The control of the following Departments of the Public Service shall be at once assigned to and assumed and taken over by the Executive Government of the Commonwealth, and the Commonwealth shall assume the obligations of any State or States with respect to such matters, that is to say—

Customs and Excise,
Posts and Telegraphs,
Military and Naval Defence,
Ocean Beacons and Buoys, and Ocean Lighthouses and Lightships,
Quarantine.

Powers under existing Law to be exercised by Governor-General with advice of Executive Council.

11. All powers and functions which are at the date of the establishment of the Commonwealth vested in the Governor of a Colony, with or without the advice of his Executive Council, or in any officer or authority in a Colony, shall, so far as the same continue in existence and need to be exercised in relation to the government of the Commonwealth, with respect to any matters which under this Constitution pass to the Executive Government of the Commonwealth, vest in the Governor-General, with the advice of the Federal Executive Council, or in the officer or authority exercising similar powers or functions in or under the Executive Government of the Commonwealth.

CHAPTER III.

THE FEDERAL JUDICATURE.

Supreme Court of Australia and Inferior Courts.

1. The Parliament of the Commonwealth shall have power to establish a Court, which shall be called the Supreme Court of Australia, and shall consist of a Chief Justice, and so many other Justices, not less than four, as the Parliament from time to time prescribes. The Parliament may also from time to time, subject to the provisions of this Constitution, establish other Courts.

Tenure of office.

2. The Judges of the Supreme Court of Australia and of the other Courts of the Commonwealth shall hold their offices during good behaviour, and shall receive such salaries as may from time to time be fixed by the Parliament; but the salary paid to any Judge shall not be diminished during his continuance in office.

Appointment and removal of Judges.

3. The Judges of the Supreme Court and of the other Courts of the Commonwealth shall be appointed, and may be removed from office, by the Governor-General by and with the advice of the Federal Executive Council; but it shall not be lawful for the Governor-General to remove any Judge except upon an Address from both Houses of the Parliament praying for such removal.

Appellate Jurisdiction.

4. The Supreme Court of Australia shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament from time to time prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences, of any other Federal Court, or of the highest Court of final resort now established, or which may hereafter be established, in any State, whether such Court is a Court of Appeal or of original jurisdiction, and the judgment of the Supreme Court of Australia in all such cases shall be final and conclusive.

Until the Parliament makes other provisions, the conditions of and restrictions on appeals to the Queen in Council from the highest Courts of final resort of the several States shall be applicable to appeals from such Courts to the Supreme Court of Australia.

Appeals may be made final in all cases.

5. The Parliament of the Commonwealth may provide by law that any appeals which by any law have heretofore been allowed from any judgment, decree, order, or sentence, of the highest Court of final resort of any State to the Queen in Council, shall be brought to, and heard and determined by, the Supreme Court of Australia, and the judgment of that Court in all such cases shall be final and conclusive.

Power of the Queen to allow appeal to Herself in certain cases.

6. Notwithstanding the provisions of the two last preceding sections, or of any law made by the Parliament of the Commonwealth in pursuance thereof, the Queen may in any case in which the public interests of the Commonwealth, or of any State, or of any other part of the Queen's Dominions, are concerned, grant leave to appeal to Herself in Council against any judgment of the Supreme Court of Australia.

Extent of power of Federal Courts.

7. The Parliament of the Commonwealth may from time to time define the jurisdiction of the Courts of the Commonwealth, other than the Supreme Court of Australia, which jurisdiction may be exclusive, or may be concurrent with that of the Courts of the States. But jurisdiction shall not be conferred on a Court except in respect of the following matters, or some of them, that is to say:—

- (1) Cases arising under this Constitution ;
- (2) Cases arising under any Laws made by the Parliament of the Commonwealth, or under any treaty made by the Commonwealth with another country ;
- (3) Cases of Admiralty and Maritime jurisdiction ;
- (4) Cases affecting the Public Ministers, Consuls, or other Representatives of other countries ;
- (5) Cases in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party ;
- (6) Cases in which a Writ of Mandamus or Prohibition is sought against an Officer of the Commonwealth ;
- (7) Controversies between States ;
- (8) Controversies relating to the same subject matter claimed under the laws of different States.

Original jurisdiction.—Additional original jurisdiction may be conferred.

8. In all cases affecting Public Ministers, Consuls, or other Representatives of other Countries, and in all cases in which the Commonwealth, or any person suing or being sued on behalf of the Commonwealth, is a party, or in which a Writ of Mandamus or Prohibition is sought against an Officer of the Commonwealth, and in all cases of controversies between States, the Supreme Court of Australia shall have original as well as appellate jurisdiction.

The Parliament may confer original jurisdiction on the Supreme Court of Australia in such other of the cases enumerated in the last preceding section as it thinks fit.

Actions against the Commonwealth or against a State.

9. Nothing in this Constitution shall be construed to authorise any suit in law or equity against the Commonwealth, or any person sued on behalf of the Commonwealth, or against a State, or any person sued on behalf of a State, by any individual person or corporation, except by the consent of the Commonwealth, or of the State, as the case may be.

Number of Judges.

10. The jurisdiction of the Supreme Court, or of any other Court of the Commonwealth, may be exercised by such number of Judges as the Parliament prescribes.

Trial by jury.

11. The trial of all indictable offences cognisable by any Court established under the authority of this Act shall be by jury, and every such trial shall be held in the State where the offence has been committed, and when not committed within any State the trial shall be held at such place or places as the Parliament of the Commonwealth prescribes.

CHAPTER IV.

FINANCE AND TRADE.

Consolidated Revenue Fund.

1. All duties, revenues, and moneys, raised or received by the Executive Government of the Commonwealth, under the authority of this Constitution, shall form one Consolidated Revenue Fund, to be appropriated for the Public Service of the Commonwealth in the manner and subject to the charges provided by this Constitution.

Expenses of collection.

2. The Consolidated Revenue Fund shall be permanently charged with the costs, charges, and expenses incident to the collection, management, and receipt thereof, which costs, charges, and expenses shall form the first charge thereon.

Money to be appropriated by law.

3. No money shall be drawn from the Treasury of the Commonwealth except under appropriations made by law.

The Commonwealth to have exclusive power to levy duties of Customs and Excise and offer bounties after a certain time.

4. The Parliament of the Commonwealth shall have the sole power and authority, subject to the provisions of this Constitution, to impose Customs duties, and duties of Excise upon goods for the time being the subject of Customs duties, and to grant bounties upon the production or export of goods.

But this exclusive power shall not come into force until uniform duties of Customs have been imposed by the Parliament of the Commonwealth.

Upon the imposition of uniform duties of Customs by the Parliament of the Commonwealth all laws of the several States imposing duties of Customs or duties of Excise upon goods the subject of Customs duties, and all such laws offering bounties upon the production or export of goods, shall cease to have effect.

The control and collection of duties of Customs and Excise and the payment of bounties shall nevertheless pass to the Executive Government of the Commonwealth upon the establishment of the Commonwealth.

Transfer of officers.

5. Upon the establishment of the Commonwealth, all officers employed by the Government of any State in any Department of the Public Service the control of which is by this Constitution assigned to the Commonwealth, shall become subject to the control of the Executive Government of the Commonwealth. But all existing rights of any such officers shall be preserved.

Transfer of land and buildings.

6. All lands, buildings, works, and materials necessarily appertaining to, or used in connection with, any Department of the Public Service is by this the control of which Constitution assigned to the Commonwealth, shall, from and after the date of the establishment of the Commonwealth, be taken over by and belong to the Commonwealth, either absolutely, or, in the case of the Departments controlling Customs and Excise and Bounties, for such time as may be necessary.

And the fair value thereof shall be paid by the Commonwealth to the State from which they are so taken over. Such value shall be ascertained by mutual agreement, or, if no agreement can be made, in the manner in which land taken by the Government of the State for public purposes is ascertained under the laws of the State.

Collection of existing duties of Customs and Excise.

7. Until uniform duties of Customs have been imposed by the Parliament of the Commonwealth, the powers of the Parliaments of the several States existing at the date of the establishment of the Commonwealth, respecting the imposition of duties of Customs, and duties of excise upon goods the subject of Customs duties, and the offering of bounties upon the production or export of goods, and the collection and payment thereof respectively, shall continue as theretofore.

And until such uniform duties have been imposed, the Laws of the several States in force at the date of the establishment of the Commonwealth respecting duties of Customs, and duties of excise on goods the subject of Customs duties, and bounties, and the collection and pay-

ment thereof, shall remain in force, subject nevertheless to such alterations of the amount of duties or bounties as the Parliaments of the several States may make from time to time; and such duties and bounties shall continue to be collected and paid as theretofore, but by and to the Officers of the Commonwealth.

On establishment of uniform duties of Customs and Excise, trade within the Commonwealth to be free.

8. So soon as the Parliament of the Commonwealth has imposed uniform duties of Customs, trade and intercourse throughout the Commonwealth, whether by means of internal carriage or ocean navigation, shall be absolutely free.

Apportionment of surplus revenue.

9. The Revenue of the Commonwealth shall be applied in the first instance in the payment of the expenditure of the Commonwealth, which shall be charged to the several States in proportion to the numbers of their people, and the surplus shall, until uniform duties of Customs have been imposed, be returned to the several States or parts of the Commonwealth in proportion to the amount of Revenue raised therein respectively, subject to the following provisions:—

- (1) As to duties of Customs or Excise, provision shall be made for ascertaining, as nearly as may be, the amount of duties collected in each State or part of the Commonwealth in respect of dutiable goods which are afterwards exported to another State or part of the Commonwealth, and the amount of the duties so ascertained shall be taken to have been collected in the State or part to which the goods have been so exported, and shall be added to the duties actually collected in that State or part, and deducted from the duties collected in the State or part of the Commonwealth from which the goods were exported:
- (2) As to the proceeds of direct taxes, the amount contributed or raised in respect of income earned in any State or part of the Commonwealth, or arising from property situated in any State or part of the Commonwealth, and the amount contributed or raised in respect of property situated in any State or part of the Commonwealth, shall be taken to have been raised in that State or part:
- (3) The amount of any bounties paid to any of the people of a State or part of the Commonwealth shall be deducted from the amount of the surplus to be returned to that State or part.

After uniform duties of Customs have been imposed, the surplus shall be returned to the several States or parts of the Commonwealth in the same manner and proportions until the Parliament otherwise prescribes.

Such returns shall be made monthly, or at such shorter intervals as may be convenient.

Audit of Accounts.

10. Until the Parliament of the Commonwealth otherwise provides, the Laws in force in the several Colonies at the date of the establishment of the Commonwealth with respect to the receipt of revenue and the expenditure of money on account of the Government of the Colony, and the review and audit of such receipt and expenditure shall apply to the receipt of revenue and the expenditure of money on account of the Commonwealth in the respective States in the same manner as if the Commonwealth, or the Government or an Officer of the Commonwealth, were mentioned therein whenever a Colony, or the Government or an Officer of a Colony, is mentioned or referred to.

Equality of Trade.

No preference to one State over another.

11. Preference shall not be given by any law or regulation of commerce or revenue to the ports of one part of the Commonwealth over those of another part of the Commonwealth.

The Parliament may give effect to this prohibition.

12. The Parliament of the Commonwealth may make laws prohibiting or annulling any law or regulation made by any State, or by any authority constituted by any State, having the effect of derogating from freedom of trade or commerce between the different parts of the Commonwealth.

[A power to annul any law or regulation that might be made by a State Parliament for the purpose of defeating the policy of the Commonwealth on the subject of free-trade between the States, is obviously a necessary power ; for otherwise there would be no means of maintaining the policy as an integral part of the Constitution. This power is accordingly given to the Federal Parliament ; but it could not be exercised in the case of any law or regulation that was not clearly designed to derogate from—that is, to restrict or prevent—that free interchange of

goods or products between the States, which will form the basis of their commercial relations. It follows, therefore, that no law or regulation could come within the meaning of this clause unless it directly tended to restrict or prevent such a system of interchange; and as the only means by which that result could be accomplished would be the imposition of duties, the clause would operate only in the case of laws or regulations of a protective character, imposing duties on goods imported by sea or carried across the border.

It is asserted that the clause in question is intended to have a much wider operation, and that it would include the regulations made by the Commissioners of Railways in this colony, by which differential rates for the carriage of goods are charged on some of our lines. These rates are charged for the purpose of diverting traffic from certain points in the interior to Sydney, in order to prevent its passing to Melbourne, Adelaide, or Brisbane, as the nearest port; and it is essential to the prosperity of Sydney, it is said, that this policy should be maintained. But the abolition of the rates would have the effect of defeating that policy, and causing the traffic in question to flow into its natural channel outside our borders.

This construction of the clause is, on the face of it, a forced one. In the first place, it has never been contended, before this question was raised, that the differential rates constitute a violation of the principles of free-trade. The commercial policy of the country has always been based on free-trade; the policy itself has formed the subject of party discussion for many years; but on neither side has it been alleged, until the present time, that the differential rates were framed, or are kept up, in the interests of a protectionist policy. As they do not involve any tax on products, but, on the contrary, offer facilities for traffic in the shape of reduced charges, it is impossible to place them on the list of protective laws or regulations. If they operate in that direction, they can only do so indirectly and remotely; and the clause in question could not be held to apply to cases of that description.

In the second place, if it was intended to place the traffic charges on State railways under the control of the Federal Parliament, the power of control would have been given in express terms. It would not have been left to implication, if only for this reason, that it would constitute a direct interference with the internal administration of the States, and consequently a direct violation of a fundamental principle of the Constitution, formulated in clause 1 of chapter v. It is expressly declared in that clause that all the existing powers of the Parliament in each colony, which are not withdrawn from it, or exclusively vested in the Federal Parliament, shall remain untouched. Among those powers, that of controlling the railway system in all its branches is one of the most vital; but there is not a line in the draft Bill which can be said to withdraw it from the local Parliament, or vest it in that of the Commonwealth. The power of interference with the railways vested in the latter is expressed in sub-clause 28 of clause 52, which together give it a concurrent power to make laws as to "the control of railways with respect to transport for the purposes of the Commonwealth." That is a necessary power to vest in the Federal Parliament, for obvious reasons; but it does not affect the control of the railways for any other purpose than that stated, and certainly not for any commercial purpose.

The construction sought to be placed on clause 12 is based on the remarks made by some members of the Convention during the discussion on the draft Bill. One of the South Australian delegates having expressed his desire to know whether its provisions would enable the Federal Parliament to put an end to the differential rates charged on our railways, the chairman of the drafting committee informed him that the only form of words that would express such a power would be "control of railway tariffs," but that the committee did not see their way to insert any such words. The extent to which they were prepared to go was expressed in clause 12. This statement was followed by some general remarks on the subject, which amount to this: the Federal Parliament will have power to annul any law made by a State which would really interfere with freedom of trade,

by prohibiting it from going through a State to its natural port. This statement does not pretend to contradict the previous one, that the power to abolish a railway tariff could only be given by express words ; all it says is that a State law prohibiting freedom of trade might be annulled. Although the two things are quite distinct, considerable doubt seems to have been raised on the subject ; from which we may see the folly of seeking to interpret the draft Bill by incorporating with it all the conversation that took place in the Convention. The speeches made by the delegates may be usefully referred to for information ; but the bill must be read in its own light, and not in that of the debates.]

Consolidation of Public Debts of States.

Public debts of States may be consolidated by general consent.

13. The Parliament of the Commonwealth may, with the consent of the Parliaments of all the States, make laws for taking over and consolidating the whole or any part of the public debt of any State or States, but so that a State shall be liable to indemnify the Commonwealth in respect of the amount of a debt taken over, and that the amount of interest payable in respect of a debt shall be deducted and retained from time to time from the share of the Surplus Revenue of the Commonwealth which would otherwise be payable to the State.

CHAPTER V.

THE STATES.

Continuance of powers of Parliaments of the States.

1. All powers which at the date of the establishment of the Commonwealth are vested in the Parliaments of the several Colonies, and which are not by this Constitution exclusively vested in the Parliament of the Commonwealth, or withdrawn from the Parliaments of the several States, are reserved to, and shall remain vested in, the Parliaments of the States respectively.

Validity of existing laws.

2. All Laws in force in any of the Colonies relating to any of the matters declared by this Constitution to be within the Legislative powers of the Parliament of the Commonwealth shall, except as other-

wise provided by this Constitution, continue in force in the States respectively, and may be repealed or altered by the Parliaments of the States, until other provision is made in that behalf by the Parliament of the Commonwealth.

Inconsistency of Laws.

3. When a Law of a State is inconsistent with a Law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

Powers to be exercised by Governors of States.

4. All powers and functions which are at the date of the establishment of the Commonwealth vested in the Governors of the Colonies respectively, shall, so far as the same are capable of being exercised after the establishment of the Commonwealth in relation to the government of the States, continue to be vested in the Governors of the States respectively.

All references to the Queen to be through the Governor-General.

5. All references or communications required by the Constitution of any State or otherwise to be made by the Governor of the State to the Queen shall be made through the Governor-General, as Her Majesty's Representative in the Commonwealth, and the Queen's pleasure shall be made known through him.

[Under a federal form of Government it is necessary to provide for the conduct of external affairs in which the federated colonies, or any of them, may be interested; and that can only be done by concentrating the administration of such affairs in the Federal Executive Council. It follows as an inevitable consequence that there can be but one official channel of communication between the Commonwealth, or any of the States composing it, and the outside world. The communications which, under the present system, pass between the Secretary of State and the Governors of the various colonies would, under a federal government, necessarily pass between the Secretary of State and the Governor-General; in other words, the Governors would be addressed through him, and through him also they would address the Imperial Government. It would be obviously impossible to maintain the present practice a day after the Federal Constitution came into force. It is not merely that such a practice would be in the highest degree inconvenient, as requiring the Secretary of State to

correspond with six or seven colonies after they had virtually become consolidated into one State. There is a stronger, and a conclusive, reason in the fact that the Federal Government, being necessarily interested in the external affairs of each colony in the federation, would have a clear right to be consulted with respect to any communications that the Governor of a colony might propose to send to the Secretary of State. If, for instance, during a period of agitation on the Chinese question, all the Governors were to address themselves to him independently of the Federal Government, it would clearly be tantamount to taking the whole matter out of their hands. The policy of the Commonwealth would have to be collected from half a dozen sources, each of which might present independent and possibly conflicting views on the question, as compared with the others. The result would be that one of the main objects of all federations—a united front against the outside world—would become impossible.

Notwithstanding the obvious necessity for the provision in question, it has been censured as a “strangely impertinent interference with the independent rights of the several States,” which would enable the advisers of the Governor-General to “prevent unfettered communication” between them and the Imperial Government. There is nothing in the clause to warrant any such inference. The right of free communication with the Secretary of State would not be fettered, merely because a letter or a telegram to him had to be addressed to the Governor-General in the first instance. Every colonist has the right to address the Secretary of State on any subject he pleases; but his letter must be sent through the Governor of the colony in which he resides, or it will not receive any attention in England. That restriction has never been attacked on the ground that it fettered, or tended to fetter, the right of free communication between the colonists and the Home Government. On the contrary, the reasons in favour of it are so clear that it has been universally recognised as not only a just, but a necessary restriction. The same line of reasoning will apply in the case of a

communication passing between the Australian Governors and the Colonial Office. The right would remain exactly as it was before, and the practice would be altered only so far as the necessity of the case might require.

There might be some colour for the objection if the draft Bill had followed the terms of the Canadian Act, by substituting for the present Governors a system of Lieutenant-Governors, to be appointed by the Governor-General and to hold office during his pleasure. Such an alteration in the existing Constitution would do more than subordinate the Governors to the Governor-General; it would, in effect, place them under the immediate control of the Federal Executive Council. But no such change is contemplated. The Governors of the States would remain as they are now, subject to any alterations as to the mode of appointment and tenure of office which the State Parliaments might think fit to make.]

Saving of Constitutions.

6. Subject to the provisions of this Constitution the Constitutions of the several States of the Commonwealth shall continue as at the date of the establishment of the Commonwealth, until altered by or under the authority of the Parliaments thereof in accordance with the provisions of their respective Constitutions.

Governors of States.

7. In each State of the Commonwealth there shall be a Governor.

Appointment of Governors.

8. The Parliament of a State may make such provisions as it thinks fit as to the manner of appointment of the Governor of the State, and for the tenure of his office, and for his removal from office.

Application of provisions referring to Governor.

9. The provisions of this Constitution relating to the Governor of a State extend and apply to the Governor for the time being of the State, or other the Chief Executive Officer or Administrator of the Government of the State, by whatever title he is designated.

Members of Senate or House of Representatives not to sit in State Parliament.

10. A member of the Senate or House of Representatives shall not be capable of being chosen or of sitting as a member of any House of the Parliament of a State.

Member of State Parliament not to be Member of the Parliament of the Commonwealth.

11. If a member of a House of the Parliament of a State is, with his own consent, chosen as a member of either House of the Parliament of the Commonwealth, his place in the first mentioned House of Parliament shall become vacant.

A State may cede any of its Territory.

12. The Parliament of a State may at any time surrender any part of the State to the Commonwealth, and upon such surrender and the acceptance thereof by the Commonwealth such part of the State shall become and be subject to the exclusive jurisdiction of the Parliament of the Commonwealth.

States not to levy import or export duties, except for certain purposes.

13. A State shall not impose any taxes or duties on imports or exports, except such as are necessary for executing the inspection laws of the State; and the net produce of all taxes and duties imposed by a State on imports or exports shall be for the use of the Commonwealth; and any such inspection laws may be annulled by the Parliament of the Commonwealth.

Nor levy duty of tonnage, nor tax the land of the Commonwealth, nor maintain forces.—State land exempted from taxation.

14. A State shall not, without the consent of the Parliament of the Commonwealth, impose any duty of tonnage, or raise or maintain any military or naval force, or impose any tax on any land or other property belonging to the Commonwealth; nor shall the Commonwealth impose any tax on any land or property belonging to a State.

State not to coin money.

15. A State shall not coin money, or make anything but gold and silver coin a legal tender in payment of debts.

Nor prohibit any religion.

16. A State shall not make any law prohibiting the free exercise of any religion.

Protection of citizens of the Commonwealth.

17. A State shall not make or enforce any law abridging any privilege or immunity of citizens of other States of the Commonwealth, nor shall a State deny to any person, within its jurisdiction, the equal protection of the laws.

Recognition of Acts of State of various States.

18. Full faith and credit shall be given, throughout the Commonwealth, to the Laws, the Public Acts and Records, and the Judicial Proceedings of the States.

Protection of States from invasion.

19. The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of a State, against domestic violence.

Custody of offenders against laws of the Commonwealth.

20. Every State shall make provision for the detention and punishment in its prisons of persons accused or convicted of offences against the laws of the Commonwealth, and the Parliament of the Commonwealth may make laws to give effect to this provision.

CHAPTER VI.

NEW STATES.

Admission of existing Colonies to the Commonwealth.

1. Any of the existing Colonies of [*name the existing Colonies which have not adopted the Constitution*] may upon adopting this Constitution be admitted to the Commonwealth, and shall thereupon become and be a State of the Commonwealth.

New States may be admitted to the Commonwealth.

2. The Parliament of the Commonwealth may from time to time establish and admit to the Commonwealth new States, and may upon such establishment and admission make and impose such conditions, as to the extent of Representation in either House of the Parliament or otherwise, as it thinks fit.

Provisional government of Territories.

3. The Parliament may make such laws as it thinks fit for the provisional administration and government of any territory surrendered by any State to and accepted by the Commonwealth, or any territory in the Pacific placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may in any such case allow the representation of such territory in either House of the Parliament to such extent and on such terms as it thinks fit.

Alteration of limits of States.

4. The Parliament of the Commonwealth may, from time to time, with the consent of the Parliament of a State, increase, diminish, or otherwise alter the limits of the State, upon such terms and conditions as may be agreed to, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to any State affected by it.

Saving of rights of States.

5. A new State shall not be formed by separation of territory from a State without the consent of the Parliament thereof, nor shall a State be formed by the union of two or more States or parts of States, or the limits of a State be altered, without the consent of the Parliament or Parliaments of the State or States concerned.

CHAPTER VII.

MISCELLANEOUS.

Seat of Government.

1. The seat of Government of the Commonwealth shall be determined by the Parliament.

Until such determination is made the Parliament shall be summoned to meet at such place within the Commonwealth as a majority of the Governors of the States, or, in the event of an equal division of opinion amongst the Governors, as the Governor-General shall direct.

Power to Her Majesty to authorise Governor-General to appoint Deputies.

2. The Queen may authorise the Governor-General from time to time to appoint any person or any persons jointly or severally to be his Deputy or Deputies within any part or parts of the Commonwealth, and in that capacity to exercise during the pleasure of the Governor-General such of the powers and functions of the Governor-General as he deems it necessary or expedient to assign to such Deputy or Deputies, subject to any limitations or directions expressed or given by the Queen, but the appointment of such Deputy or Deputies shall not affect the exercise by the Governor-General himself of any power or function.

Aborigines of Australia not to be counted in reckoning population.

3. In reckoning the numbers of the people of a State or other part of the Commonwealth aboriginal natives of Australia shall not be counted.

CHAPTER VIII.

AMENDMENT OF THE CONSTITUTION.

Mode of amending the Constitution.

1. The provisions of this Constitution shall not be altered except in the following manner:—

Any law for the alteration thereof must be passed by an absolute majority of the Senate and House of Representatives, and shall thereupon be submitted to Conventions, to be elected by the electors of the several States qualified to vote for the election of Members of the House of Representatives.

The Conventions shall be summoned, elected, and held in such manner as the Parliament of the Commonwealth prescribes by law, and shall, when elected, proceed to vote upon the proposed amendment.

And if the proposed amendment is approved by the Conventions of a majority of the States, and if the people of the States whose Conventions approve of the amendment are also a majority of the people of the Commonwealth, the proposed amendment shall be presented to the Governor-General for the Queen's assent.

But an amendment by which the proportionate representation of any State in either House of the Parliament of the Commonwealth, or the minimum number of representatives of a State in the House of Representatives, is diminished, shall not become law without the consent of the Convention of that State.

THE SCHEDULE.

I, A.B., do swear [*or do solemnly and sincerely affirm and declare*] that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, her heirs, and successors, according to law.

(NOTE.—*The name of the King or Queen of the United Kingdom of Great Britain and Ireland for the time being is to be substituted from time to time.*)



C

111649

Law
Const.
B293

Institute the Commonwealth of

1891.

NAME OF BORROWER.

evlin, stud

